

§ 296.24

(b) Shall award MSP Operating Agreements within a priority—

(1) In accordance with operational requirements specified by the SecDef;

(2) In the cases of the Priorities III and IV, according to the applicants' records of owning and operating vessels; and

(3) Subject to the approval of the SecDef.

(c) The Secretary does not have discretion to override the priority requirements with respect to the initial award of MSP Operating Agreements.

§ 296.24 Subsequent awards of MSP Operating Agreements.

(a) Until October 1, 2005, if, for any reason, after the award of an MSP Operating Agreement, the Applicant is unwilling or unable to commence operations pursuant to the terms of the MSP Operating Agreement, MARAD may, pursuant to the priority criteria, award that MSP Operating Agreement to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement.

(b) After October 1, 2005, MARAD intends to ensure that all available MSP Operating Agreements are fully utilized at all times, in order to maximize the benefit of the MSP. Accordingly, when an MSP Operating Agreement becomes available through termination by the Secretary, expiration of a temporary MSP Operating Agreement or early termination by the MSP contractor, and no transfer under 46 U.S.C. 53105(e) is involved, MARAD will reissue the MSP Operating Agreement pursuant to the following criteria.

(1) The proposed vessel must meet the requirements for vessel eligibility in 46 U.S.C. 53102(b);

(2) The applicant must meet the vessel ownership and operating requirements for priority in 46 U.S.C. 53103(c); and

(3) Priority will be assigned in accordance with operational requirements specified by the SecDef.

(c) MARAD will use the following procedures in reissuing an MSP Operating Agreement. MARAD and USTRANSCOM will determine if the applications received on October 15, 2004 form an adequate pool for award of a reissued MSP Operating Agreement.

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If so, MARAD will award a reissued MSP Operating Agreement from that pool of qualified applicants in its discretion, subject to approval of the SecDef. MARAD and USTRANSCOM may decide to open a new round of applications. Applicants for reissued MSP Operating Agreements must meet the citizenship requirements of Priority III. Inasmuch as MSP furthers a public purpose and MARAD does not acquire goods or services through MSP, the selection process for award of MSP Operating Agreements does not constitute an acquisition process subject to any procurement law or the Federal Acquisition Regulations.

Subpart D—Maritime Security Program Operating Agreements

§ 296.30 General conditions.

(a) *Approval.* (1) The Secretary, in conjunction with the SecDef, may approve applications to enter into an MSP Operating Agreement and make MSP Payments with respect to vessels that are determined by the Secretary to be commercially viable and those that are deemed by the SecDef to be militarily useful for meeting the sealift needs of the United States in time of war or national emergencies. The Secretary announced an initial award of 60 MSP Operating Agreements on January 12, 2005. In addition, the Secretary advised those applicants found to be eligible but not included in the initial award that those applicants will be wait-listed for an award of an MSP Operating Agreement if additional slots become available.

(2) The Commander established general evaluation criteria for operational requirements for considering replacement vessels described in § 296.21(e), and for vessels eligible under the third and fourth priorities described in § 296.22. These general evaluation criteria were made available by the Commander in sufficient time for preparing applications.

(b) *Effective date—(1) General Rule.* Unless otherwise provided, the effective date of an MSP Operating Agreement is October 1, 2005.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in an MSP Operating Agreement that is on charter

to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Agreement (EPA) provided by § 53107 of the MSA 2003, unless an earlier date is requested by the applicant, the effective date for an MSP Operating Agreement shall be:

(i) The expiration or termination date of the Government charter covering the vessel; or

(ii) Any earlier date on which the vessel is withdrawn from that charter, but not before October 1, 2005.

(c) *Replacement Vessels.* A Contractor may replace an MSP vessel under an MSP Operating Agreement with another vessel that is eligible to be included in the MSP under § 296.11(a), if the Secretary, in conjunction with the SecDef, approves the replacement vessel. The replacement vessel must qualify with the same or with more militarily useful capability as the MSP vessel to be replaced for operational requirements as determined by the Commander.

(d) *Termination by the Secretary.* If the Contractor materially fails to comply with the terms of the MSP Operating Agreement:

(1) The Secretary shall notify the Contractor and provide a reasonable opportunity for the Contractor to comply with the MSP Operating Agreement;

(2) The Secretary shall terminate the MSP Operating Agreement if the Contractor fails to achieve such compliance; and

(3) Upon such termination, any funds obligated by the relevant MSP Operating Agreement shall be available to the Secretary to carry out the MSP.

(e) *Early termination by Contractor, generally.* An MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies the Secretary not later than 60 days before the effective date of the proposed termination that the Contractor intends to terminate the MSP Operating Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments, and by its EPA for the full term, from October 1, 2005 through September 30, 2015, of the MSP Operating Agreement.

(f) *Early termination by Contractor, with available replacement.* An MSP Operating Agreement shall terminate without further obligation on the part of the Contractor upon the expiration date of the three-year period beginning on the date a vessel begins operating under the MSP, if:

(1) The Contractor notifies the Secretary, by not later than two years after the date the vessel begins operation under an MSP Operating Agreement, that the Contractor intends to terminate the MSP Operating Agreement; and

(2) The Secretary, in conjunction with the SecDef, determines that:

(i) An application for an MSP Operating Agreement has been received for a replacement vessel that is acceptable to the Secretaries; and

(ii) During the period of an MSP Operating Agreement that applies to the replacement vessel, the replacement vessel will be:

(A) Owned and operated by one or more persons that are Section 2 Citizens; or

(B) Owned by a person that is a Documentation Citizen and operated by a person that is a Section 2 Citizen.

(g) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority of MSA 2003 for that fiscal year, the Secretary will notify the Senate's Committees on Armed Services and Commerce, Science, and Transportation, and the House of Representatives' Committee on Armed Services, that MSP Operating Agreements for which sufficient funds are not available, will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If only partial funding is appropriated by the 60th day of such fiscal year, then the Secretary, in consultation with the SecDef, shall select the vessels to retain under MSP Operating Agreements, based on the Secretaries' determinations of the most militarily useful and commercially viable vessels. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated and, each Contractor shall be released from its obligations under the MSP Operating Agreement. Final payments

under the terminated MSP Operating Agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former MSP Operating Agreements may be reinstated if mutually acceptable to the Administrator and the Contractor provided the MSP vessel remains eligible.

(h) *Release of Vessels from Obligations:* If an MSP Operating Agreement is terminated by the Contractor, with available replacement under paragraph (f) of this section, or if sufficient funds are not appropriated for payments under an MSP Operating Agreement for any fiscal year by the 60th day of that fiscal year, then—

(1) Each vessel covered by the terminated MSP Operating Agreement is released from any further obligation under the MSP Operating Agreement;

(2) The owner and operator of a non-tank vessel or a tank vessel not built under the NDTVCP may transfer and register the applicable vessel under a foreign registry deemed acceptable by the Secretary and the SecDef, notwithstanding section 9 of the Shipping Act, 1916 (46 App. U.S.C. 808) and 46 CFR part 221;

(3) The owner and operator of a tank vessel built under the NDTVCP must formally apply to MARAD pursuant to section 9 of the Shipping Act, 1916 to transfer and register the vessel under a foreign registry; and

(4) If section 902 of the Act is applicable to a vessel that has been transferred to a foreign registry due to a terminated MSP Operating Agreement, then that vessel is available to be requisitioned by the Secretary pursuant to section 902 of the Act.

(5) Paragraph (h) of this section is not applicable to vessels under MSP Operating Agreements that have been terminated for any other reason.

(i) *Foreign Transfer of Vessel.* A Contractor may transfer a non-tank vessel to a foreign registry, without approval of the Secretary, if the Secretary, in conjunction with the SecDef, determines that the contractor will provide a replacement vessel:

(1) Of equal or greater military capability or of a capacity that is equivalent or greater as measured in dead-

weight tons, gross tons, or container equivalent units, as appropriate;

(2) That is a documented vessel under 46 U.S.C. chapter 121 by the owner of the vessel to be placed under a foreign registry; and

(3) That is not more than 10 years of age on the date of that documentation.

(j) *Transfer of MSP Operating Agreements.* A Contractor subject to an MSP Operating Agreement may transfer that MSP Operating Agreement (including all rights and obligations under that MSP Operating Agreement) to any person eligible to enter into an MSP Operating Agreement under § 296.10 and of the same or more restrictive U.S. citizen priority, provided that prior approval to transfer the MSP Operating Agreement is granted by the Secretary and the SecDef. The Contractor should allow at least 90 days for processing of a transfer request.

§ 296.31 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements are authorized for 10 years, starting on October 1, 2005, and ending on September 30, 2015, but payments to Contractors are subject to annual appropriations each fiscal year. MARAD may enter into MSP Operating Agreements for a period less than the full term authorized under the MSA 2003.

(b) *Terms under a Continuing Resolution (CR).* In the event funds are available under a CR, the terms and conditions of the MSP Operating Agreements shall be in force provided sufficient funds are available to fully meet obligations under MSP Operating Agreements, and only for the period stipulated in the applicable CR. If funds are not appropriated under a CR at sufficient levels for any portion of a fiscal year, the Secretary will select the vessels to retain within the funding level of the previous fiscal year, in consultation with the SecDef, based on the Secretaries' determination of the most militarily useful and commercially viable vessels. With regard to an MSP Operating Agreement that does not receive funds, the terms and conditions of any applicable MSP Operating Agreement may be voided and the Contractor may request termination of the MSP Operating Agreement.